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No. 97-1906

In The
Supreme Court of the United States
October Term, 1997

MELONIE WADE,
Petitioner,

vs.

VICTORIA COLLEGE,
Respondent.

On Petition for a Writ of Ceritorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERITIORARI

COUNTER-STATEMENT OF THE CASE

The court of appeals in this case affirmed summary judgment for the College because Petitioner Melonie Wade ("Wade") failed to produce sufficient evidence to create a genuine issue of material fact on her claim of retaliation under Title VII of the Civil Rights Act of 1964. The Fifth Circuit based its ruling on legal principles that are fully consistent with the precedent of this Court and other circuits. This case presents no issue that warrants review by this Court.

Pursuant to Rule 15.2 of the Rules of the Supreme Court of the United States, Respondent The Victoria College (the "College") identifies the following misstatements of fact in Wade's Petition for Writ of Certiorari (hereinafter "Petition"). The following misstatements bear on issues that properly would be before the Court if certiorari were granted.

The Facts

As she did below, Wade continues to assert as "fact" certain propositions that are not true and not supported by any evidence. Indeed, the District Court granted the College's motion for summary judgment in large part because "Wade bases her retaliation claim mostly on speculation, inadmissible hearsay, or unhelpful facts." (Pet. App. 18) For these reasons, the College offers the following accurate statement of facts:

In July of 1991, Tom Walton ("Walton") hired Wade as an assistant to help him with the "Tech Prep" program, a federally funded, statewide technical education program administered by the College. (Pet. App. 6-7) Walton was the College official responsible for the program, and he directly supervised Wade.

Wade alleged that, over the next seven-plus months, Walton made several offensive comments of a sexual nature. (Pet. App. 7-8) Wade never complained of these comments at the time they were made. Indeed, she did not indicate in any way that she found them offensive until months later, on February 25, 1992. (Pet. App. 8 & n.1)

On that day, Wade confronted Walton and, for the first time, complained that she found certain of his comments unwelcome. (Pet. App. 8 & n.1) Walton immediately apologized, informed Wade that he was not aware he had done anything wrong, and promised to refrain from making any offensive comments or actions in the future. (Pet. App. 8) Walton never engaged in any action that Wade considered to be sexual harassment after that date. (Pet. App. 8 & 15)

Shortly before Wade informed Walton that she found some of his comments offensive, Wade and Walton became embroiled in a dispute over who had ultimate authority over the Tech Prep program. In early February 1992, a state official at the Texas Higher Education Coordinating Board sent a memo to members of Tech Prep programs across the state that caused confusion about the distribution of authority between the community colleges and certain Tech Prep personnel, such as Wade. Wade interpreted the

memo to mean that she did not report to anyone at the College. Without conferring with Walton, Wade then created a board of directors for the local Tech Prep consortium of business and education. On February 25, 1992, Wade sent out a memorandum inviting persons to serve on the board of directors.

Walton found out about Wade's actions and, over the next two days, Wade and Walton had several arguments regarding various facets of the Tech Prep program. (Pet. App. 8) Walton complained that Wade created the board of directors without his input. (Pet. App. 8) Based on her interpretation of the memo from the Texas Higher Education Coordinating Board, Wade told Walton that she did not have to answer to him. Walton challenged Wade's claimed authority over Tech Prep. (Pet. App. 8)

Wade assumes that these arguments were retaliation for telling Walton that she found some of his comments offensive. However, the College submitted undisputed summary judgment evidence indicating that the Wade-Walton arguments actually centered around their dispute regarding authority over the Tech Prep program. (Pet. App. 2) There is no evidence to the contrary.

On February 28, 1992, Wade complained to Dr. Jimmy Goodson, the President of the College, that Walton made inappropriate sexual comments. (Pet. App. 9) In response to Wade's complaint, Dr. Goodson immediately removed Walton as Wade's supervisor and directed that Wade would thereafter report directly to Dr. Steve Thomas, the College's Dean of Instruction. (Pet. App. 9) In addition to taking away Walton's supervisory authority over Wade, Dr. Goodson directed Walton to avoid face-

to-face conversations with Wade. (Pet. App. 9) Walton and Wade were never again alone together and never had any direct dealings (other than limited telephone conversations while Wade was absent due to an extensive illness). (Pet. App. 9 & n.3)

In her Petition, as she did below, Wade asserts that Walton thereafter retaliated against her for complaining to Dr. Goodson. Wade alleged sporadic incidents over several months following her report to Dr. Goodson. However, Wade failed to support her allegations with any competent summary judgment evidence.

For example, Wade claims that after Walton was stripped of his supervisory authority over her, she was told "she would have to continue working with Walton." (Pet. 5) Wade's allegation is untrue and belied by her own admissions in the summary judgment record. The record evidence is undisputed that Walton and Wade never worked together again and that Walton never again had any supervisory authority over Wade.

Wade also asserts that Walton "kept Wade from getting information she was supposed to get regarding the [Tech Prep] program." (Pet. 14) Again, Wade produced no evidence in support of this allegation. In fact, Wade admitted that she merely "assumed" that Walton had done something wrong. (Pet. App. 19)

Perhaps most significantly, Wade complains that Walton caused a "boycott" of a Tech Prep committee meeting in November of 1992. (Pet. 6 & 14) This is the last incident alleged by Wade to be "retaliation" and the only incident that Wade alleges to have occurred at any time close to her January 1993 resignation. Again, however, Wade's allegation is untrue and

unsupported by any evidence. The College submitted undisputed evidence that Walton had nothing to do with the problems at the committee meeting (which neither Wade nor Walton attended). (Pet. App. 11) In fact, Wade admitted that she had no personal knowledge of the supposed "boycott" and failed to challenge the College's evidence regarding the meeting. (Pet. App. 19 & n.10)

Not only was Wade unable to set forth specific, competent evidence of retaliation in the nearly 11 months between her complaint of sexual harassment and her resignation, the undisputed summary judgment evidence demonstrates that the College was extremely supportive of Wade. Wade was never disciplined or reprimanded in any way during her tenure at the College. Rather, after she complained about Walton's alleged sexual harassment, Walton was removed from supervision of Wade and of the Tech Prep project, while Wade was promoted to the position of Tech Prep Coordinator and was given a raise. (Pet. App. 11)

In spite of the College's positive treatment of Wade, Wade did not attempt to resolve her problems from within her existing employment relationship. Even though Wade successfully resolved her concerns about sexual harassment by reporting them to Dr. Goodson, Wade never returned to Dr. Goodson to complain of any alleged retaliation. (Pet. App. 20) Rather, Wade simply resigned her employment, effective January 15, 1993. (Pet. App. 11)

REASONS THE WRIT SHOULD BE DENIED

In her Petition, Wade argues that this Court should adopt a new standard for employer liability in retaliation cases. Because

the new standards proposed by Wade are inapplicable under the facts of this case, and because she would not meet the standards she seeks to have established, this case prevents no issue that warrants this Court's review.

I.

The Issue of Employer Liability for Supervisor Retaliation Is Not Presented By This Case.

In her Petition, Wade makes several arguments in support of her claim that certiorari should be granted. Each of her theories depends upon a crucial factual predicate which is not present in this case—the alleged retaliator's supervision of the alleged victim. Wade first argues that the College "is responsible for retaliation against an employee for reporting sexual harassment committed by a supervisory employee who uses his supervisory status to effectuate the retaliation." (Pet. 7) Wade then asserts that the College "is responsible for the supervisory employee's retaliation" because it did nothing to stop it. (Pet. 11) The appropriate standard for employer liability for retaliatory acts of a plaintiff's supervisor is not at issue in this case because Walton was not Wade's supervisor.

The cases cited by Wade are inapposite. For example, Wade cites *Cross v. Cleaver*, No. 97-3441, 1998 WL 164414 (8th Cir., April 10, 1998) in support of her argument for strict liability. (Pet. 8) Key to the Eight Circuit's holding in *Cross* was the fact that the alleged retaliator "had direct authority over the [alleged victim]." *Cross*, 1998 WL 164414 at *14. Attempting to apply *Cross* to this

case, Wade summarily asserts that "Walton had direct authority over Wade." (Pet. 10) This is untrue and wholly unsupported by the record evidence.

As noted by both the district court and the court of appeals, it is undisputed that Dr. Goodson stripped Walton of his authority over Wade and prevented any significant contact between the two of them. Relying on the undisputed evidence offered by the College, the district court noted "Walton was not in a position of authority to alter the terms and conditions of her employment after February 28, 1992." (Pet. App. 19) Rather, Wade reported directly to Dr. Thomas, who gave her a promotion and a raise. (Pet. App. 2, 9, 11, 16, 19) Accordingly, Wade's proposed legal standards, whatever their merit, do not apply in this case.[1]

II.

The Issue of What Constitutes an Adverse Employment Action Is Not Presented By This Case.

In the district court and the court of appeals, Wade prosecuted her retaliation claim under a theory of constructive discharge.

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[1] In her Petition, Wade also argues by analogy to sexual harassment cases involving harassment by the plaintiff's immediate supervisor. This Court recently clarified the standard for employer liability in cases with harassment by "a supervisor with immediate (or successively higher) authority over the employee." *Burlington Industries, Inc. v. Ellerth*, No. 97-569, 1998 WL 336326 at *15 (U.S. June 26, 1998). Unlike the situation in *Burlington Industries*, Walton did not have immediate or successively higher authority over Wade.

Because there was no evidence of intolerable working conditions imposed by Walton or the College, and no evidence of retaliatory motive, the district court and the Fifth Circuit rejected Wade's claim.[2]

In her Petition, Wade argues that the Fifth Circuit's standard for "adverse employment action" is too onerous and should be replaced by a standard that allows a retaliation claim to proceed under a hostile environment theory. (Pet. 11-13) Wade did not present this theory below and she cites no circuit court authority for this novel proposition.[3] In any event, this Court need not decide which standard applies. Under either standard, Wade cannot prevail.

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[2] In discussing her constructive discharge claim, Wade claims that the issue "cannot be resolved on summary judgment" because issues of reasonableness are involved. (Pet. 15). This assertion is directly contrary to established precedent of this Court. Summary judgment is appropriate where the nonmoving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). Under the principles set forth in *Celotex* and related cases, the strength of factual allegations even as subjective as a party's intent can be tested at the summary judgment stage. *Wyatt v. Cole*, 504 U.S. 158, 171, 112 S. Ct. 1827, 1835, 118 L.Ed.2d 504 (1992) (Kennedy, J., concurring).

[3] In fact, this Court denied certiorari in a case where the issue was squarely presented. *Mattern v. Eastman Kodak Co.*, 104 F.3d 702 (5th Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S. Ct. 336, 139 L.Ed.2d 260 (1997).

This Court has indicated that a plaintiff must come forth with evidence of "severe and pervasive" conduct to support a hostile work environment claim. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21, 114 S. Ct. 367, 370, 126 L.Ed.2d 295 (1993). Circumstances to be considered in determining whether conduct is sufficiently severe and pervasive to create a hostile environment include the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance. *Id.*

As noted above, Wade complains of sporadic "retaliatory" acts over an 11-month period. The conduct complained of is not frequent, severe, threatening or humiliating. More importantly, most of the alleged retaliatory acts have no evidentiary basis; rather, they are based on "speculation, inadmissible hearsay, or unhelpful facts." (Pet. App. 18-19) Discounting Wade's assumptions and speculation and considering the competent evidence of the College's positive treatment of Wade throughout her employment, no reasonable jury could conclude that Wade was subjected to a hostile work environment. Accordingly, Wade could not prevail under a hostile work environment theory of "adverse employment action."

Additionally, even had Wade submitted sufficient evidence to establish the requisite severity and pervasiveness to meet the standard for a hostile work environment, Wade would still be required to come forward with evidence of causation. In the

context of a sexual harassment claim, this Court recently reaffirmed that

> Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at "discriminat[ion] . . . because of . . . sex." We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations.

Oncale v. Sundowner Offshore Services, Inc., ___ U.S. ___, 118 S. Ct. 998, 1002, 140 L.Ed.2d 201 (1998). Even if a retaliation claim could be prosecuted under a hostile environment theory, the plaintiff would have to produce evidence that the harassing conduct was directed at the plaintiff because of the plaintiff's protected activity. Here, Wade failed to produce evidence to raise a genuine issue of material fact regarding retaliatory intent. (Pet. App. 4) Because Wade failed to produce evidence sufficient to withstand summary judgment even under the standard she seeks to employ, the Petition presents no issue for this Court's review.

III.

The Fifth Circuit Properly Determined That There Were No Issues of Material Fact on the Issue of Causation.

Wade's final appeal is that the Fifth Circuit erred in concluding that she failed to raise an issue of material fact on the issue of causation. (Pet. 16) Wade concedes that the College submitted evidence of legitimate, nondiscriminatory reasons for its

actions. (Pet. 16) Wade neglects to mention that these reasons were never rebutted. Instead, Wade restates the factual assertions for which there is no competent summary judgment evidence. Because Wade failed to present evidence of a causal connection, and because Wade failed to rebut the College's evidence of legitimate, nondiscriminatory reasons, summary judgment for the College was proper.

CONCLUSION

For the foregoing reasons, Wade's petition for writ of certiorari should be denied.

Respectfully submitted,

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